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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

16 IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION AND
INCORPORATED MEMORANDUM
TO SEAL**

20 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively
21 “Bard”) hereby respectfully move this Court for an order, pursuant to the Stipulated
22 Protective Order (Doc. 268), Federal Rule of Civil Procedure 26(c)(1)(G), and Local Civil
23 Rule 5.6 sealing certain documents accompanying Bard’s Response to Plaintiffs’ Brief on
24 Foreign Regulatory Materials. The exhibits that are the subject of Bard’s Motion to Seal
25 constitute trade secrets or other confidential research, development, or commercial
26 information, thereby warranting protection from public disclosure for a discovery related
27 motion. Accordingly, there is good cause to grant Bard’s Motion to Seal. Although the
28 plaintiffs do not oppose Bard’s motion, the plaintiffs have noted during the meet and

1 confer process that they reserve the right to challenge any of the confidential designations
 2 pursuant to the Stipulated Protective Order (Doc. 269 ¶ 2) at a later time.

ARGUMENT AND CITATION OF AUTHORITY

4 In conjunction with Bard's Response to Plaintiffs' Brief on Foreign Regulatory
 5 Materials, Bard wishes to submit the following confidential documents to the Court for its
 6 consideration: deposition testimony from Rob Carr's March 18, 2016 deposition;
 7 documents regarding Bard's sales and marketing document control policies for foreign
 8 materials; drafts of Bard's instructions for use for the Denali™ Filter; and an internal
 9 email chain regarding discussions with an international regulatory agency ("Documents at
 10 Issue").¹ The Documents at Issue reflect Bard's confidential trade secrets and/or contain
 11 highly competitive, confidential, or proprietary information that warrants protection under
 12 Federal Rule of Civil Procedure 26(c)(1)(G) because the documents are not made public
 13 by Bard and, if obtained by Bard's competitors, would give an unfair economic advantage
 14 to those competitors.

15 **A. Bard Asserts that the Documents At Issue Are "Confidential Information"
 Pursuant to the Stipulation for Protective Order, and Therefore They Should
 Be Sealed**

16 The Court has entered a Stipulated Protective Order to protect public disclosure of
 17 "Confidential Information," which includes any "'trade secret' or other confidential
 18 research, development, or commercial information' that is suitable for protection under
 19 Federal Rule of Civil Procedure 26(c)(1)(G)" Stipulated Protective Order (Doc. 269 ¶¶ 1,
 20 2.) Bard has designated the Documents at Issue in this motion as "CONFIDENTIAL" in
 21 its recent production of those documents during discovery (*Id.* ¶ 6). Finally, the
 22 Stipulated Protective Order states "All Confidential Information shall be used for the
 23 purpose of this lawsuit only . . . except as permitted by this Order." (*Id.* ¶ 12). These types
 24 of provisions are common in legal proceedings and are routinely enforced. *See, e.g.,*
 25 *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 307 (N.D. Ill. 1993) ("We hold
 26 that confidential information obtained by Culinary in this litigation may not be
 27

28 ¹ A more detailed listing of each exhibit at issue is attached as Exhibit A.

1 disseminated to litigants in other cases against Raychem.”); *cf. Smithkline Beecham Corp.*
 2 *v. Synthon Pharmaceuticals Ltd.*, 210 F.R.D. 163, 169 (M.D.N.C. 2002) (refusing to
 3 modify protective order to allow plaintiffs to use confidential documents in other
 4 litigation). Thus, the Court should grant Bard’s Motion to Seal to maintain the
 5 confidentiality afforded by the Stipulated Protective Order to the Documents at Issue.

6 **B. The Documents at Issue Warrant Protection Pursuant to Fed. R. Civ. P.
 7 26(c)(1)(G) as Trade Secrets or Other Confidential Research, Development or
 8 Commercial Information, and Would Cause Bard Competitive Harm if Made
 9 Public**

10 Federal Rule of Civil Procedure 26(c)(1)(G) provides that the Court may, for good
 11 cause, “issue an order to protect a party or person from annoyance, embarrassment,
 12 oppression, or undue burden or expense, including . . . (G) requiring that a trade secret or
 13 other confidential research, development, or commercial information . . . be revealed only
 14 in a specified way.” “Good cause” exists when disclosure will result in “a clearly defined
 15 and serious injury to the party” seeking closure. *Blanchard & Co., Inc. v. Barrick Gold*
 16 *Corp.*, No. 02-3721, 2004 WL 737485, at *5 (E.D. La. Apr. 5, 2004) (citing *Pansy v.*
 17 *Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). In determining whether “good
 18 cause” exists, the court “must balance the requesting party’s need for information against
 19 the injury that might result if uncontrolled disclosure is compelled.” *Id.* The Court has
 20 wide discretion in determining the scope of an order protecting confidential research,
 21 development, or commercial information. *See id.*

22 The information contained in the Documents at Issue includes confidential business
 23 and trade secret information concerning Bard’s development of sales and marketing
 24 materials, as well as its interactions with foreign regulatory agencies, and contains highly
 25 sensitive information related to those areas. *See id.* The Documents at Issue are not made
 26 public by Bard and, if obtained by Bard’s competitors, would give an unfair economic
 27 advantage to those competitors.

28 Finally, because the Documents at Issue do not relate to a motion that requires
 29 judicial resolution of this case on the merits, there is no general First Amendment right to

1 access the Documents at Issue. *See, e.g., Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*,
 2 263 F.3d 1304, 1312–13 (11th Cir. 2001) (finding that “material filed with discovery
 3 motions is not subject to the common-law right of access, whereas discovery material
 4 filed in connection with pretrial motions that require judicial resolution of the merits is
 5 subject to the common-law right”); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir.
 6 1995) (“We are not aware . . . of any common-law principle that documents submitted to a
 7 court in camera for the sole purpose of confirming that the refusal to disclose them to
 8 another party was proper, are to be deemed judicial records open to the public.”); *The
 9 Courier-Journal v. Marshall*, 828 F.2d 361, 363 (6th Cir. 1987) (newspapers had no first
 10 amendment right of access to discovery materials, despite the recognition that
 11 “proceedings [were] of intense public concern”).

12 For each of these reasons, Bard has met the good cause standard for protection of
 13 its documents by showing that public disclosure of the Documents at Issue will cause a
 14 clearly defined injury to Bard. *See Shell Exploration & Prod. Co. v. Robinson*, No.
 15 CIV.A. 01-1417, 2001 WL 1490954 (E.D. La. Nov. 20, 2001) (finding that good cause
 16 existed for sealing judicial record “out of an abundance of caution in order to protect trade
 17 secrets” even when the testimony at issue “would not be particularly illuminating,” the
 18 “testimony did not specify any particular trade secrets”). Accordingly, the Court should
 19 grant Bard’s Motion to Seal.

20 **CONCLUSION**

21 For the foregoing reasons, the Documents at Issue warrant protection as
 22 confidential research, development, or commercial information pursuant to Rule
 23 26(c)(1)(G). Accordingly, the Court should grant Bard’s Motion to Seal.

24 DATED this 6th day of September, 2016.

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**Attorney for Defendants C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.**

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2 **CERTIFICATE OF SERVICE**
3
4

5
6 I hereby certify that September 6, 2016, the foregoing was electronically filed with
7 the Clerk of Court using the CM/ECF system which will automatically send email
8 notification of such filing to all attorneys of record.
9
10

11 s/Richard B. North, Jr.
12 Richard B. North, Jr.
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